

Message Text

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ACTION EUR-12

INFO OCT-01 EA-07 ISO-00 STR-04 AID-05 CEA-01 CIAE-00

COME-00 EB-08 FRB-03 INR-07 IO-13 NEA-10 NSAE-00

USIA-06 OPIC-03 SP-02 TRSE-00 LAB-04 SIL-01

AGRE-00 OMB-01 DODE-00 DOTE-00 FMC-01 CG-00

DLOS-09 OES-06 L-03 /107 W

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R 061401Z APR 77

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PASS TREASURY AND COMMERCE

E.O. 11652: N/A

TAGS: EFIN, EWWT, OECD

SUBJECT: GOP SHIPPING MEASURES VS. OECD CODE

REF: (A) STATE 62522; (B) LISBON 2222; (C) OECD

9561 (NOTAL)

1. SUMMARY: OECD'S INVISIBLES COMMITTEE (IC) WILL PROBABLY CONSIDER QUESTION OF APPLICABILITY OF OECD CODE OF LIBERALIZATION OF CURRENT INVISIBLE OPERATIONS TO GOP SHIPPING MEASURES REPORTED REF B AND PREVIOUS EMBASSY LISBON MESSAGES. OECD SECRETARIAT'S PRELIMINARY ASSESSMENT IS THAT MEASURES APPEAR TO CONTRAVENE CODE, BUT THAT, IF IC UPHOLDS THIS VIEW, GOP IS LIKELY SIMPLY TO ASK FOR CODE DEROGATION ON THIS ITEM IN CONJUNCTION WITH REQUEST FOR DEROGATIONS ON MANY OTHER ITEMS WHICH IC WILL CONSIDER AT NEXT SESSION.

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END SUMMARY.

2. GOP MEASURES WERE NOT DISCUSSED AT MARCH 21 MEETING OF CONSULTATIVE SHIPPING GROUP. AT MARCH 23 SESSION OF IC, SWISS ALTERNATE DREW ATTENTION TO THEM AND IN RESPONSE GOP REP INDICATED SECRETARIAT WOULD BE OFFICIALLY NOTIFIED.

3. WHILE FORMAL NOTIFICATION OF GOP MEASURE NOT YET RECEIVED (AND OFFICIAL TRANSLATION NOT YET AVAILABLE) SECRETARIAT HAS INITIATED EXAMINATION OF COMPATIBILITY OF MEASURES WITH OBLIGATIONS UNDER INVISIBLES CODE. INTERPRETATION IS PRIMARILY BASED ON PROVISIONS OF NOTE L IN ANNEX A THAT "FREEDOM OF TRANSACTIONS AND TRANSFERS IN CONNECTION WITH MARITIME TRANSPORT SHOULD NOT BE HAMPERED BY LEGISLATIVE PROVISIONS IN FAVOUR OF THE NATIONAL FLAG, BY ARRANGEMENTS MADE BY GOVERNMENTAL OR SEMI-GOVERNMENTAL ORGANISATIONS GIVING PREFERENTIAL TREATMENT TO NATIONAL FLAG SHIPS." QUESTION IS COMPLICATED BY ENTRIES INTO COUNCIL MINUTES AT TIME OF CODE'S ADOPTION -- SEE OECD/C/M(61) -- WHICH INTRODUCES SOME AMBIGUITY. FIRST, IT WAS AGREED THAT FOR THE BULK OF INVISIBLE OPERATIONS, "OPERATIONS FOR A MEMBER GOVERNMENT'S OWN ACCOUNT" ARE NOT SUBJECT TO LIBERALIZATION BUT THAT "THIS INTERPRETATION WAS WITHOUT PREJUDICE TO THE PROVISIONS OF THE ITEMS C/1, MARITIME FREIGHTS, AND C/5, MARITIME TRANSPORT SERVICES, AS INTERPRETED BY NOTE 1 TO THE LIST OF CURRENT INVISIBLE OPERATIONS." SECOND, THE COUNCIL "NOTED" AN INTERVENTION BY PORTUGUESE REP WHICH RECALLED EARLIER STATEMENT THAT "IN AGREEING ... (TO NOTE 1), PORTUGAL PRESUMES THAT THE REQUISITE CONDITIONS FOR THE EFFECTIVE ESTABLISHMENT OF FREE AND FAIR INTERNATIONAL COMPETITION IN MARITIME TRANSPORT ARE, OR WILL BE, SATISFIED, BOTH IN LAW AND FACT." (THIS EARLIER STATEMENT -- SEE OECD/C/M(6L) -- ELABORATED ON PORTUGUESE LIMITED OFFICIAL USE

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CONCERNS AND ALLUDED TO THE FAILURE OF THE U.S. TO ADHERE TO THE PRINCIPLES OF NOTE 1, INDICATING THAT IN "ACCEPTING THE PROVISIONAL CONTINUATION OF NOTE 1" IT WISHED TO EMPHASIZE THESE CONCERNS.) THUS, GOP COULD BE EXPECTED TO ARGUE THAT: (A) OPERATIONS ENVISIONED ARE FOR THE ACCOUNT OF THE GOVERNMENT AND THUS EXCLUDED FROM CODE; AND/OR (B) DE FACTO FREE AND FAIR INTERNATIONAL COMPETITION IS LACKING SO THAT THE PREMISE OF GOP ADHERENCE IS INVALID. ALTHOUGH SECRETARIAT WILL CONTINUE TO EXAMINE THE ISSUE, ITS INFORMAL FEELING IS THAT STRONG CASE EXISTS AGAINST PORTUGAL, PARTICULARLY WITH RESPECT TO CLAUSE TWO OF ARTICLE 1, WHICH CONCERNS GOODS DESTINED FOR PUBLIC SECTOR BODIES BUT NOT ACTUALLY IMPORTED BY THEM.

4. INTERESTING GENERAL QUESTION ARISES AS TO WHETHER TRANSACTIONS OF A NATIONALIZED INDUSTRY CAN BE SAID TO BE UNDERTAKEN FOR A "GOVERNMENT'S OWN ACCOUNT."

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5. ASSUMING SOME CONTRAVENTION IS FOUND, GOP COULD IN THEORY INCLUDE THESE MEASURES WITH OTHER RESTRICTIONS FOR WHICH IT WILL BE SEEKING DISPENSATION FROM ITS OBLIGATIONS UNDER LIBERALIZATION AND CAPITAL MOVEMENTS CODES (SEE PARA 7, REF C). IC WOULD THEN HAVE TO CONSIDER WHETHER GOP ECONOMIC SITUATION WARRANTED SUCH DEROGATIONS AND MAKE RECOMMENDATION TO COUNCIL.

6. COMMENT: WHILE WE AGREE IT WOULD BE AWKWARD FOR U.S. MEMBER OF IC TO INVOKE CODE IN OBJECTING TO PORTUGUESE SHIPPING MEASURES (PARA 3, REF A), OTHERS MAY WELL DO SO, AND U.S. MEMBER WOULD THEN HAVE SOME OBLIGATIONS TO PARTICIPATE IN EFFORT TO INTERPRET CODE ON THIS POINT AND TO ASSESS OVERALL PORTUGUESE ECONOMIC SITUATION. AS AN INITIAL REACTION TO THIS COMPLEX

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CASE, WE BELIEVE THAT GOP MEASURES DO CONTRAVENE CODE
AND THAT IT WOULD BE DIFFICULT TO JUSTIFY A DEROGATION,
WHICH IS MEANT TO ALLOW FOR GENERAL ECONOMIC OR
BALANCE OF PAYMENTS DIFFICULTIES, BY EXTENDING ITS
SCOPE TO COVER SECTORAL DIFFICULTIES SUCH AS HAVE
ALLEGEDLY BEEN EXPERIENCED BY PORTUGAL IN SHIPPING.
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